caveats to protect their equitable interests in the land. I do not think such proposition holds much water. In my view, the fact that the plaintiff, knew of the circumstances alleged, does not necessarily indicate or suggest that it had actively and deliberately encouraged the defendants to enter into the Sale and Purchase Agreements with the developer. No fraud can rationally and reasonably be inferred from such circumstances. Indeed on the evidence as disclosed in the affidavits, I can find no fraud or collusion on the part of the plaintiff. And even if there was fraud on the part of the registered co-proprietors and/or the developer, there is not a scrap of evidence that the plaintiff was a party to such fraud: see *Hajah Rajiah bte. Haji Man v. Tai Chang Finance Bhd. supra.*

In the circumstances and for the reasons given, I hold that as between the plaintiff and the defendants, there are no serious questions to be tried. No balance of convenience has been shown. The defendants' remedy, if at all, must lie against the developer and/or the registered co-proprietors. Undoubtedly, the plaintiff is the first and only registered chargee of the land namely sublots 126 and 128. As such it has an indefeasible title to the land. The registered charge of the plaintiff is also ranked in priority over the joint caveat lodged by the defendants. In the premises, the plaintiff is entitled to have the said caveat removed and I so order. Cost of this proceeding be given to the plaintiff.

PUBLIC PROSECUTOR

v.

IBRAHIM BIN ARIFIN

HIGH COURT, PENANG
TUAN VINCENT NG KIM KHOAY JC
[CRIMINAL TRIAL NO. 47-17-91]
27 FEBRUARY 1993

DANGEROUS DRUGS: Charge of trafficking in cannabis - Whether plant material seized was cannabis - Section 2 Dangerous Drugs Act 1952 - Whether resin had been extracted from plant material - Evidence of chemist - Whether chemist had done quantitative test to show non-extraction of resin.

The Accused was charged with trafficking in a dangerous drug, to wit cannabis weighing 256.51 grammes, an offence under s. 39B(1)(a) of the Dangerous Drugs Act 1952 (the Act).

The question that arose was whether the prosecution had succeeded in proving an essential element of the charge, namely that the plant material seized from the Accused was cannabis as defined under the definition in s. 2 of the Act.

Two further questions arose for determination, namely whether the prosecution was justified in witholding the police report of the police officer who apprehended the Accused from the defence and whether at the close of the prosecution case, the prosecution was under a duty to make available witnesses for the defence.

[Ed. Note: The following paras of the headnote were provided by His Lordship Vincent Ng Kim Khoay JC]

Held:

[1] The complete removal of the original provision in s. 113(1) of the Criminal Procedure Code by virtue of Act A324 has the effect of clearly and decisively removing the pre-amendment distinction between first information and non-first information police reports.

[2] There is no justification for the refusal by the learned DPP to supply a copy of the police report to the defence on the ground that same is not a first information report or for any other reason; it being also, a public document by virtue of s. 35 of the Evidence Act.

[3] After the close of the prosecution case, prosecution witnesses should not merely be offered but should be made available to the defence.

[4] The words "at any stage" in s. 425 of the Criminal Procedure Code would mean that the Court may exercise its discretion to summon any person as a witness even if it entails the re-opening of the prosecution case, provided that the defence is not thereby prejudiced and it appears to be essential to a just decision of the case. However, such discretion should not be exercised where the defence had begun their submission of no-case-to-answer and the application of the prosecution is for the purpose of effecting repairs on the prosecution case to counter points submitted by the defence in their submission of no-case-to-answer.

[5] It is only by Dequinois Levin Test (DLT) and Thin Layer Chromatography (TLC) tests that the presence, though not the quantity of cannabinoids are revealed. It is not the resins but the cannabinoids in the resins that is the offensive hallucinating agent envisaged in the Act. None of the four tests including the DLT and TLC tests are quantitative tests for cannabis resins. The resin itself does not bear any structure peculiar to cannabis resins.

[6] The chemist would not have conceivably addressed or focussed his mind on the question of plentiful or substantial presence of cannabis resin or cannabinoids in the plant material before the decision in *Loo Keck Leong*, whereby the mere presence of cannabis resin combined with the requisite morphological features of the plant was, until *Loo Keck Leong*, sufficient to satisfy the Court that the plant was cannabis plant.

[Accused acquited and discharged without calling him to enter upon his defence].

Cases referred to:
Pendakwa Raya v. Lee Hoay Chun Penang High Court Criminal Trial No. 47 (58)-13-88 (unreported) ***(refd)***
Wai Chan Leong v. PP [1989] 2 CLJ 1168 ***(refd)***
Ramli bin Kechik v. PP [1986] 1 CLJ 308 / [1986] 2 MLJ 33 ***(refd)***
Loo Keck Leong v. PP [1992] 3 CLJ 1332 / [1992] 2 MLJ 177 ***(foll)***
PP v. Alcontara [1993] 1 CLJ 206 ***(foll)***

Legislation referred to:
Criminal Procedure Code, ss. 113(1), 180 & 425
Dangerous Drugs Act 1952, ss. 2, 39B(1)(a)
Evidence Act 1950, s. 35

For the Public Prosecutor - Mat Zaraai bin Alias, DPP
For the Accused - S. Asamaley; M/s. A. Asamaley & Co.

JUDGMENT

Vincent Ng Kim Khoay JC:
The accused was charged as follows:

> Bahawa kamu pada 22 Januari, 1991, jam lebih kurang 12.50 tengahari di belakang rumah No. 122-A, Jalan Tanjong Tokong, di dalam Daerah Georgetown, di dalam Negeri Pulau Pinang, telah mengedar dadah merbahaya, iaitu ganja seberat 256.51 gram dan oleh itu kamu telah melakukan suatu kesalahan di bawah s. 39B(1)(a) Akta Dadah Merbahaya 1952 dan boleh dihukum di bawah s. 39B (2) Akta yang sama.

The main witnesses of the prosecution case were D/Const. Ramli bin Baharom (PW7) and D/Cont. Mat Halim bin Din (PW9).

PW7 testified that on 22 January 1991 at about 12.50 pm, he together with PW9 proceeded on a motor cycle to the back of a wooden premises No. 122-A Jalan Tanjong Tokong, District of Georgetown, State of Pulau Pinang (the said premises). When they reached an open space at the side of the said house they left the motor cycle there and proceeded on foot towards the back of the said house.

As soon as they reached the edge of the fence at the back of the house, and about 10 meters away, they saw one Malay male (identified as the accused) riding a black Suzuki T.R.S. motor cycle bearing registration No. PAP 831 (the said motor cycle). The accused was then wearing a white helmet (P19) and a yellow "T" shirt with dark pants and heading towards their direction. By uttering the words "Berhenti polis" and raising his hand, PW7 signalled the accused to stop.

Then, at about 5 meters away from them, the said motor cycle turned back toward it's right. At that moment both PW7 and PW9 saw a white coloured plastic bag (P4) placed on top of the petrol tank at the area nearer to the rider's seat of the said motor cycle and between the thighs of the accused. Upon turning, the accused tried to speed away on the said motor cycle. However, as the path comprised lose sand, the said motor cycle could not gather speed and both PW7 and PW9 gave chase to apprehend the accused. When the said motor cycle reached a curve in the path, it lost control

and fell towards its right. PW7 and PW9 were then 7 to 8 meters away. As it fell, the accused leapt towards the left, while also grasping P4, and ran away with same with the two said witnesses hot on his heels.

They chased the accused until he was caught at about 30 meters away from where the motor cycle fell. PW7 and PW9 immediately seized P4 from the left hand of the accused. P4 bore the marking "Gama" and was tied with a single knot.

When PW7 opened P4 he found two plastic bags, one coloured red (P5) and the other blue (P8). Inside P5 he found 50 small plastic packets [P7 (i) to (xxxxx)] and in P8 he found another 50 similar plastic packets [P10 (i) to (xxxxx)]. He saw in each of all the total 100 small plastic packets, some dried plant material which he suspected to be cannabis. All the collective dried plant material in packets P7 (i) to (xxxxx) was identified as P6A and all the collective plant material from P10 (i) to (xxxxx) was identified as P9A.

Immediately after examining the contents of P4, PW7 seized the NRIC (P17) of the accused and found that same bore the name Ibrahim bin Arifin (K/P 3466086). The accused was then arrested and P4 with its contents was seized by PW7.

PW7 then brought the accused back to the fallen motor cycle, which was searched but nothing incriminating was found. A search was also conducted at the accused's house at address No. 85, Mukim 18, Jalan Tanjong Tokong, Pulau Pinang but nothing incriminating was found.

PW7 also testified that after arresting the accused and when he was about to return to Cawangan Anti-Dadah, Georgetown, he saw one Malay male in front of an unoccupied hut (pondok) not far from where the motor cycle fell - the distance he was unsure of. He took down the particulars of this Malay male as Jaafar bin Mohamed, whose whereabouts could not now be traced. PW7 saw Jaafar bin Mohamed only after the accused was brought back to the spot where the motorcycle fell.

The accused was then taken with the exhibits to CAD, Georgetown by PW7 who then lodged Pulau Tikus Report No. 147/91 on the said arrest.

During the course of the prosecution case, two issues arose which called for this court's ruling, though both the issues are inconsequential and bear no relevance to my current decision.

(a) *The First Issue:*

Towards the end of the cross-examination of PW7 Counsel requested the learned DPP to let him have sight of the said Pulau Tikus Report No. 147/91. The learned DPP objected to the request and I overruled the objection on the following grounds:

> The complete removal of the original provision in s. 113(1) of the Criminal Procedure Code by virtue of Act A 324 which states: "No statement made by any person ... in the course of a police investigation ... shall ... be used as evidence" and its replacement with a new provision which states: "Where any person is charged ... any statement ... by that person ... shall be admissible in evidence ... and ... may be used in cross-examination for the purpose of impeaching his credit" - the latter provision concerns and pertains only to any person who is charged as opposed to the earlier generalised provision - has the effect of clearly and decisively removing the pre-amendment distinction between first information and non-first information police reports.
>
> There is thus no justification for the refusal by the learned DPP to supply a copy of PW7's report to the defence on the ground that same is not a first information report or for any other reason; it being also, a public document by virtue of s. 35 of the Evidence Act. See *Pendakwa Raya v. Lee Hoay Chun* Penang High Court Criminal Trial No. 47 (58)-13-88 (unreported) and *Wai Chan Leong v. PP* [1989] 2 CLJ 1168 at p. 1171 col. E Rt.

However, counsel could make nothing of the copy of the said police report supplied to him pursuant to my ruling as he did not use same.

(b) *The Second Issue:*

The prosecution closed its case and offered to the defence four witnesses including one Jaafar bin Mohamed who was the Malay male who appeared at the said unoccupied hut (pondok).

When I ruled that witnesses should not merely be offered but should also be made available, and enquired whether Jaafar bin Mohamed could be made available to the defence, in view of an earlier disclosure on his whereabouts during the prosecution case, the learned DPP immediately applied to re-open its case to call one or two witnesses to testify as to the whereabouts of Jaafar bin Mohamed. Counsel objected to this.

The Court overruled Counsel's objections and allowed the prosecution to reopen its case for the aforesaid specific purpose, on the following grounds:

(i) Section 425 of the Criminal Procedure Code allows the Court at any stage of the trial to summon any person as a witness if his evidence appears to be essential to the just decision of the case.

(ii) The words "at any stage" in s. 425 of the Criminal Procedure Code would mean that the Court may exercise its discretion under this provision even if it entails the reopening of the prosecution case, provided that the defence is not thereby prejudiced and it appears to be essential to a just decision of the case.

(iii) The defence is not prejudiced by the prosecution being allowed to call witnesses for the aforesaid specific purpose, considering that the application was made immediately after the close of the prosecution case and was not a case where the defence had begun their submission of no-case-to-answer and the application is for the purpose of effecting repairs on the prosecution case to counter points submitted by the defence in their submission of no-case-to-answer. See also *Ramli bin Kechik v. PP* [1986] 2 MLJ 33.

At the close of the case for the prosecution I was satisfied on a *prima facie* basis that the accused was in control and custody of P4 containing P6A and P9A which was seized from him on 22 January 1991 and there was no break in the chain of handling of the exhibits from the time of such seizure until they were produced in Court.

However, there is only one issue for judicial determination raised by the defence in their submission of no case for the accused to answer. The basis of the defence submission being the Supreme Court decision in *Loo Keck Leong v. PP* [1992] 2 MLJ 177 and my decision in *PP v. Alcontara* [1993] 1 CLJ 206.

The issue taken by the defence Counsel is whether the plant material in P6A and P9A is cannabis as statutorily defined under the pre-amendment s. 2 of the Act governing our present case. It was submitted that the chemist, PW1 had conducted the same tests that the respective chemists in *Loo Keck Leong (ibid)* and *Alcontara (ibid)* had conducted. What was seriously challenged by the defence was PW1's evidence that, and I quote: "I also found the presence of grandular hairs and also the presence of plentiful of resins in its natural droplet and globular form ... Form all these tests I concluded that the plant material in the 100 packets was cannabis as defined in the Dangerous Drugs Act."

He claimed that in his visual examination (first test) by stereo microscope, he found plentiful of resins. The resin itself does not bear any structure peculiar to cannabis resins, which would mean that this resin is similar to any other plant resin. It only becomes cannabis resins when cannabinoids are present. The visual examination conducted by PW1 would reveal the presence of resigns but would not reveal the presence of cannabinoids. It is only by Dequinois Levin Test (DLT) and Thin Layer Chromatography (TLC) tests that the presence, **though not the quantity** of cannabinoids are revealed. It is not the resins but the cannabinoids in the resins that is the offensive hallucinating agent envisaged in the Act. None of the four tests including the DLT and TLC tests are quantitative tests for cannabis resins, according to PW1.

PW1 said that his mind was focussed on the question of the plentiful presence of resins because even at that time all chemists were aware of the definition in s. 2 of the Dangerous Drugs Act. If this was so, the great detail in which he expressed the presence of cannabis resin by the words "I found the presence of granular hairs and also the presence of plentiful of resins in its natural droplet and globular form ..." makes such evidence highly incredible when he also acknowledged that such findings had not been recorded by him. He admitted that he "is now saying so from memory". In his worksheet he merely ticked the word "positive" against the words "resins" and "granular hairs" to indicate presence of the two factors.

He said that he had done about 3000 to 4000 tests in respect of cannabis cases; in all such tests he had found plentiful of resins. He said that the term "plentiful" of resin expressed by him varied in quantity in each testing, and "plentiful" to him "does not necessarily mean substantial".

Closer and analytical scrutiny of the above evidence would inevitably lead to the following queries in the Court's mind:

(1) As PW1 had spoken from memory, did he base his alleged findings on the presence of "plentiful of resins" in P6A and P9A through a process of generalisation, in view of his assertion that in all his 3,000 to 4,000 tests on cannabis cases he had found plentiful of resins; rather than through actual and specific tests conducted on P6A and P9A?

(2) Is PW1's statement that his term "plentiful" of resin in each of his 3000 to 4000 testing varies in quantity and that "plentiful dies not necessarily mean substantial", acceptable in a Court of law?

(3) Could he conceivably have addressed or focussed his mind on the question of the "plentiful" or substantial presence of cannabis resin or cannabinoids in P6A and P9A before the decision in *Loo Keck Leong (ibid)*?

(4) As PW1 had not said that he found plentiful of cannabinoids in P6A and P9A, could we assume that as he had found plentiful of resins in the plant material, this would in turn mean that he had found plentiful of cannabinoids in the resins?

(5) In a capital charge, and considering that the question of non-extraction of cannabis resin is a matter of science, could such evidence of PW1 found a conviction of the accused?

My answers to (1) above is in the positive and to (2), (3), (4) and (5) are in the negative.

To hold otherwise on (1) and (5) above would be to return to the pre *Loo Keck Leong (ibid)* position in law where the requisite morphological features of the plant combined with the mere presence of cannabis resin is sufficient to satisfy the Court that the plant is beyond all doubt and truely, cannabis plant. Needless to say that this would also make amendment A834 of 1992 to s. 2 of the Act unnecessary. It is vital to note that since *Loo Keck Leong (ibid)* chemists giving evidence in Court have merely indulged themselves in the realm of speculation and conjecture on the question of non-extraction of cannabis resin. This, some of them have done clumsily while others brillantly e.g. PW1 - though improving by the day - but all of them from the barricades of professionalism and apparent expertise, little appreciating the pot-shots that they are taking on a man's life in a capital charge.

PW1 had also stated that after the decision in *Loo's* case they held a meeting of Government chemists to "brainstorm a solution". The question that arises is, why do they need to "brainstorm a solution" if all that is needed was to elaborate upon the truth based upon actual observation of "plentiful" quantity of resins on the plant material examined? Furthermore, PW1 had no answer to the question put to him by Counsel, that even after the said meeting of chemists, their respective evidence in Court still materially differed from each other on the number of methods and the manner of extraction of cannabis resin.

He admitted that he is not an expert on the question of extraction of cannabis resin yet he said that P6A and P9A had not been subjected to any of the four processes of extraction known to him. The point this answer raises is that as the issue of presence of cannabis resin is a matter of science and the corollary being that the matter of the non-extraction of cannabis resin is also a matter of science, should only expert evidence be acceptable by the Court in a capital charge? I have not ventured to apply my mind to answer this question.

He admitted as follows in cross-examination:

> I have not seen thrashing done and I do not know how hard thrashing is required. By light thrashing some resin would fall off. In any context, partial extraction is not extraction - it has to be complete. It is possible that in ID6A and ID9A, partial extraction by light thrashing may have taken place; and if that had taken place, by subjecting to all my above stated tests I would not have been able to tell how much cannabis resin had been removed. When I used the word plentiful I am not using it in the comparative sense with the original amount of resin present. When I received ID6A and ID9A I would not know whether the plant material would have undergone the process of partial extraction of cannabis resin.

When Counsel suggested to him the possibility of one first removing some of the cannabis resin by light thrashing for his own purposes before marketing the plant material for the same price, in order to secure higher profits, he was unable to answer.

In my earlier decision, I had dealt with the same issue of extraction of cannabis resin at length *vide* my written judgment date 27 November 1992. On basically the same comments I had made therein in respect of the evidence of the chemist and for the further reasons I have stated hereinabove, I hold that PW1's assertion that he found in P6A and P9A, cannabis as defined in the Dangerous Drugs Act is not sustainable by his evidence, when considered in its entirety, and is devoid of any rational or scientific basis and most importantly, neither is it based on results of any or any proper analysis by him on the crucial issue of the non-extraction of cannabis resin.

As such, an essential ingredient of the charge, that the plant material in P6A and P9A seized on 22 January 1991 was cannabis as defined under the definition (governing the instant case) in s. 2 of the Act has not been made out by the prosecution at the end of the prosecution case. This essential ingredient of the charge being absent, would, even if unrebutted by the defence (say, should the accused remain silent when called to enter upon his defence), not warrant a conviction.

On the grounds aforesaid and pursuant to s. 180 of the Criminal Procedure Code, I hereby acquit and discharge the accused without calling him to enter upon his defence.

PUBLIC PROSECUTOR

v.

LEE ENG KOOI

HIGH COURT, PENANG
TUAN VINCENT NG KIM KHOAY JC
[CRIMINAL TRIAL NO. 47-45-88]
31 MARCH 1993

CRIMINAL LAW & PROCEDURE: Charge of unlawful possession of fire-arms - Prosecution failing to tender police report of raiding officer - Material contradictions between evidence of prosecution witnesses and contents of report - Effect - Whether charge proved.

EVIDENCE : Police report - Whether within the purview of ss. 91 & 92 Evidence Act 1950 - Whether parol evidence can be admitted to contradict, vary or subtract from its terms.

The Accused was charged with being in possession of fire-arms without lawful excuse contrary to s. 57(1)(a) of the Internal Security Act 1960. The prosecution led evidence to the effect that the fire-arms the subject matter of the charge were recovered from a bag held by the Accused.

Upon the application of the defence, the prosecution tendered the police report, made by the officer who led the raid, as an exhibit. The report was made contemporaneously with the raid and the contents of the report disclosed that the fire-arms were in fact found in a closed black steel cylinder in the premises occupied by the Accused and not on the Accused's person as stated by the prosecution witnesses.

[Ed. Note: The following paras of the headnote were provided by His Lordship Vincent Ng Kim Khoay JC]

Held:

[1] The complete removal of the original provision in s. 113 (1) of the Criminal Procedure Code by virtue of Act A324 has the effect of clearly and decisively removing the pre-amendment distinction between first information and non-first information police reports.

[2] The only residual distinction that remains is that whereas a first information report may be tendered and admitted in evidence under s. 108A of the Criminal